

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.4751 of 2013

ORDER:

The unsuccessful petitioners/ defendants 1 to 21, 33 to 36 and 37 filed this revision under Article 227 of the Constitution of India assailing the order dated 19.08.2013 of the learned Chairman, A.P. State Wakf Tribunal, Hyderabad, passed in I.A.No.715 of 2012 in O.S.No.48 of 2006 filed by the said petitioners/ defendants under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, requesting to permit them to amend the written statement filed by the 3rd defendant on 25.07.2006 by incorporating the paragraphs 18 to 23 as stated in the petition list.

2. I have heard the submissions of *Sri Vedula Venkata Ramana*, learned senior counsel appearing for the petitioners/ defendants (hereinafter 'defendants') and *Sri Vikar Ahmed Siddiqui*, learned counsel for the respondents 1 and 2/ plaintiffs (hereinafter, 'plaintiffs'). I have perused the material record.

3. In a suit for recovery of possession of the suit schedule property, recovery of damages and other reliefs filed by the plaintiffs against the defendants, the 3rd defendant filed a written statement resisting the suit. Be that as it may.

4. The case of the defendants in support of the request for amendment of the written statement, in brief, is as follows:

At the time of drafting the written statement, the learned counsel for the defendants had dictated the written statement to his Steno-cum-Typist covering all the aspects. Thereafter, a copy was taken out by his said Steno-cum-Typist and the 3rd defendant had affixed his signature. The learned counsel for the defendants due to his heavy work had affixed his signature

without verifying the same. The defendants as well as the counsel were under the *bona fide* impression that the entire written statement, which was dictated has been typed and a print out was taken. However, recently, while going through the written statement, the defendants came to know that the matter, which is now being requested to be incorporated in the written statement by way of the proposed amendment, is not incorporated in the original written statement by oversight and a mistake of the Steno-Typist. Thus, certain pleadings, which ought to have been specifically incorporated in the written statement, could not be stated in the original written statement. The proposed pleadings are not contrary to the pleadings already stated in the original written statement and there is no inconsistency in the pleadings already taken and the proposed pleading. If the amendment of the written statement as sought for is permitted, no prejudice would be caused to the plaintiffs. The legal position is very well settled that the amendment of the written statement can be permitted at any stage of the proceeding, if there is no inconsistency in the pleadings and when no new case is being set up. If the amendment of the written statement as sought for is not permitted, the defendants would be put to serious loss and hardship. Though the trial in the suit has commenced, since the proposed amendment is neither changing the defence already taken nor is inconsistent with the original defence, the amendment of the written statement as sought for can be permitted.

5. The plaintiffs did not file any counter. However, the plaintiffs orally resisted the application before the Tribunal *inter alia* contending as follows: "The written statement was filed on 25.07.2006. Based on the pleadings of the parties, necessary issues were settled. The evidence on the side of the plaintiff was closed. Thereafter a witness was examined on the side of the defendants. The trial is almost nearing completion. At that stage, the subject application was filed by the defendants for amendment of the written statement. The amendment is not being sought on the basis of any subsequent

events. It is only alleged that on account of a mistake committed by the Stenotypist of the counsel, who had taken dictation from the counsel, the paragraphs, which ought to have been typed in the written statement were not typed by him and that therefore, when a print out was taken, the paragraphs which were omitted were not there in the written statement. It was also alleged that the counsel did not verify the written statement due to his heavy work and the written statement as it is with omitted paragraphs was filed into Court after the same was signed by the 3rd defendant and his counsel. The very allegations reflect that the 3rd defendant and his counsel are negligent and are not diligent. The contention that the mistake was noted recently is false. The petition is devoid of merit and is liable to be dismissed.”

6. On merits and by the impugned order, the Tribunal dismissed the application.

7. The learned senior counsel appearing for the defendants while reiterating the case of the defendants would submit as under: “The amendment of the pleadings can be permitted at any stage of the suit, more particularly when the request is one made to amend the written statement and not the plaint. The principles governing the discretion to be exercised while permitting the amendment of the written statement stand on a different footing than the principles governing the discretion to be exercised in regard to amendment of the plaint. Further, if the amendment is necessary for the purpose of determining the real questions in controversy between the parties, the amendment shall be permitted. Though the trial has commenced, the same has not concluded; only one witness was examined on the side of the defendants; and the matter has not even reached the stage of arguments. Therefore, on the ground of mere delay, the amendment cannot be refused to be permitted. Further, inconsistent pleas can even be raised in a written statement by way of an amendment though the same is not permissible in case

of amendment of plaint. In the interests of justice and to avoid further litigation, even a belated amendment can be allowed. In the case on hand, the proposed defence as stated in the proposed paragraphs 18 to 23 to be incorporated by way of the proposed amendment in the written statement is not inconsistent with the defence taken in the written statement already filed. The amendment neither changes the basic defence nor is the proposed amendment inconsistent with the defence already taken in the written statement already filed. The Tribunal erroneously dismissed the petition solely on the ground of delay by erroneously observing that the proposed amendment is a lengthy amendment and runs into three pages and that in the proposed amendment certain new aspects are raised and that if the amendment is permitted, the plaintiff would be required to file a rejoinder and that the evidence of witnesses already recorded requires to be re-opened and hence, the amendment cannot be permitted. The said reasoning of the Tribunal is incorrect in view of the principles governing the discretion to be exercised while permitting the amendment of written statement.”

8. Per contra, the learned counsel for the plaintiffs while reiterating the contentions advanced before the Tribunal would further submit as follows: “A defendant cannot resile from an admission made in the written statement by taking recourse to either provisions of Order VIII Rule 9 or Order VI Rule 17 of the Code. Any amendment, whether it is of the written statement or of the plaint, which alters the basic pleading already taken cannot be permitted. By an amendment, the defendants cannot be permitted to wipe out the admissions or withdraw the defence already taken in the written statement filed. The proviso appended to order VI Rule 17 clearly bars the proposed amendment. Admittedly, trial has commenced and the suit is part-heard. It is not the case of the defendants that despite due diligence, they could not have raised the matter before the commencement of the trial. The learned counsel for the defendants having gone through the written statement cross-examined the

witnesses examined on the side of the plaintiffs. The examination-in-chief of the first witness of the defendants was also let in. The defendants cannot be heard to say that at the time of cross-examination of the witnesses for the plaintiffs and preparation of examination-in-chief of the first witness for the defendants, the counsel has not gone through the office copy of the written statement filed. If really, the mistake is a typographical mistake or is a mistake that had occasioned due to oversight as contended in the affidavit filed in support of the petition, the mistake ought to have been realized when the counsel prepared for cross-examination of the plaintiffs' witnesses or at least at the time of the preparation of the affidavit in lieu of examination of the chief of the 1st witness for the defendants. Therefore, it is obvious that the defendants are not diligent and that the theory that the Steno-typist by oversight and mistake did not type the paragraphs dictated to him by the counsel is a false and invented story. The stenographer's notebook is not filed and the affidavit of the Steno-cum-Typist is also not filed. The revision is devoid of merit and is liable to be dismissed. The Tribunal is justified in dismissing the petition for amendment filed by the defendants."

9. I have given detailed and thoughtful consideration to the facts and submissions. The only aspect to be considered is as to whether the defendants made out valid and sufficient grounds for this Court to come to a safe conclusion that inspite of due diligence, they could not have raised the matter in the proposed amendment before the commencement of the trial.

10. Admittedly, the 3rd defendant filed his written statement on 25.07.2006. The subject application for amendment of the written statement is filed in the year 2013. By way of the proposed amendment of the written statement, the defendants now intend to incorporate in their original written statement, the paragraphs 18 to 23, mentioned in the petition. The specific contentions of the defendants are as under: 'At the time of preparation of the written statement,

their counsel dictated the entire written statement to his Steno-cum-Typist. While typewriting the written statement, the Steno-cum-Typist, by mistake and oversight, omitted to typewrite the above mentioned paragraphs and therefore, in the print out of the written statement taken by him, the above-stated paragraphs were not there. The 3rd defendant affixed the signatures on the written statement wherein, paragraphs 18 to 23 were not incorporated due to the mistake of the steno-typist of the counsel. Due to his heavy work, the counsel did not verify the written statement and affixed his signature.’ The very averments in the case pleaded by the defendants sufficiently reflect not only lack of due diligence but also utter negligence on the part of the defendants and their counsel. Further, the counsel admittedly cross-examined all the witnesses examined on the side of the plaintiffs. That apart a witness for the defendants was examined and his affidavit in lieu of examination in chief was filed into Court. Therefore, the contention of the defendants that the counsel cross-examined the witness for the plaintiffs and prepared the defendants’ first witness’s examination-in-chief without going through the written statement cannot be countenanced. If really, the paragraphs stated above are omitted in the circumstances stated by the defendants, the mistake ought to have been realized when the counsel prepared himself in the first instance for cross-examination of the witnesses for the plaintiffs and at least at the time of the preparation of the 1st witness for the defendants for giving evidence. Hence, the defendants cannot be heard to say that they were not aware of the alleged omission in the written statement till after the matter was adjourned for further examination of the 1st witness for the defendants. This aspect of the matter, as rightly pointed out by the learned counsel for the plaintiffs lays bare that the theory now being sought to be advanced by the defendants in support of their request for the amendment of the written statement is far from truth. In any view of the matter, the above stated circumstances reflect that the defendants are not at all diligent.

11. Before proceeding further, it is necessary to refer to the proposed amendment, which reads as under:

Proposed Amendments:

“Para No.18: In reply to para No.4 of the plaint under reply it is denied that the property in Survey No.275 of Dhone village, admeasuring Ac. 15-25 cents is one of the attached registered and notified service inam land property of the waqf institution.

Para No.19: In reply to para No.5 & 6 of the plaint under reply all the averments made therein are denied in toto. It is denied that the defendants herein have illegally encroached over the suit property and that they are bent upon to dispose of the suit property to third parties by making housing plots for their wrongful benefit to cause wrongful loss to the waqf institution. It is further stated that the suit property is not a waqf property and as such the plaintiffs do not have any right, title or interest over the same and the defendants and their predecessors in title are in occupation of the same through valid documents and the plaintiffs are not entitled for any relief. The suit property had already lost its character as wakf long before the notifying the same as wakf property. The survey report and the notification are illegal, ineffective and void. The alleged appointment of plaintiff No.1 is invalid as the same is not ratified by the Wakf Board/respondent No.2.

Para No.20: In reply to para No.7 of the plaint under reply all the averments made therein are denied. It is denied that the suit property is waqf property and that it would fetch Rs.5,00,000/- per annum if leased out to anybody and it is also denied that the prevailing rate of lease for similar property in that area is that much and the plaintiffs are put to strict proof of the same. It is denied that the defendants have encroached the said property and that monetary loss is being caused for illegal occupation more so to a tune of Rs.15,00,000/- being the damages for the past three years before the institution of the suit. It is

necessary to mention here that the defendants are in occupation of the property by virtue of their independent title derived from their ancestors having purchased the same before the institution was in existence. The plaintiffs are not entitled for any damages of Rs.15,00,000/- at the rate of Rs.5,00,000/- per annum with a right to enhance the same due to increase in prevailing rate from the date of institution of the suit till the date of recovery of possession. The plaintiffs are put to strict proof of the same.

Para No.21: In reply to para No.9 of the plaint under reply it is denied that the cause of action arose on the dates mentioned therein more particularly on 20.1.2006 and the suit is liable to be dismissed as the plaintiffs failed to establish cause of action and the suit is also barred by limitation. As per the plaintiff's own case the cause of action has accrued on different dates on which the defendants encroached over the suit property. As already detailed supra, the defendants have purchased the suit lands on 06.05.1943, 07.05.1943 and 15.02.1942 came in actual possession of the suit lands. Those are the dates which the predecessors-in-title of any of the plaintiffs has lost possession of the suit lands and suit for possession would be barred after twelve years from 1942-1943. The muthawalli or inamdar who sold the suit land is dead long back and the right of the plaintiffs to file suit for possession has extinguished long prior to the constitution of the plaintiff No.2 by virtue of provisions under Section 2 of the Limitation Act, 1908 or Act of 1963. The appointment of plaintiff No.1 is also invalid and illegal and moreover the person who is representing mutawalli is in fact not Md. Khasim Ali who is already dead on 15.03.2004 but he is S.M.Khasim Ali. He is impersonating the appointed mutawalli who is dead. Without in any manner admitted him as mutawalli, supposing S.M.Khasim Ali for a moment to be mutawalli. Even then the suit is barred by limitation as it is filed after 12 years from the date of mutawalli. The cause of action of suit land was already extinguished long back and the provision contained in Section 107 of the Wakf Act, 1995 came into force on

01.01.1996 and said provision does not revive the extinguished right.

Therefore, suit of plaintiff is clearly barred by limitation.

Para no.22: In reply to para No.10 of the plaint under reply it is denied that the plaintiffs are entitled to recovery of the suit property as the same is not a waqf property and is liable to be dismissed. The suit property is not a wakf property but it is the private property of the defendant as such the plaintiff is required to pay court fee on the market value of the suit property. The plaintiff has to give the market value of the suit property and the Hon'ble Court may be pleased to direct him to state the market value of the suit property within the time fixed by the Court any default of plaintiff, the plaint may be rejected.

Para No.23: That the allegations of the plaintiffs which go against the interest of the defendants shall be deemed to have been denied unless specifically admitted in this written statement."

(Reproduced verbatim)

12. Now, keeping in view the facts urged by the defendants in support of their request for amendment of the written statement and also the contentions of the plaintiffs who are opposing the said request of the defendants, it is necessary to first refer to the proviso to Order VI Rule 17 of the Code which reads as under:

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial."

12.1 In the stated backdrop of facts and contentions it is profitable to refer to the legal position settled in the following precedents.

In the decision in VIDYABAI V/s. PADMALATHA¹ the Supreme Court observed that proviso to Order VI Rule 17 of the Code is couched in a

¹ (2009) 2 Supreme Court Cases 409

mandatory form and, therefore, the court's jurisdiction to allow an application for amendment is taken away there under unless the conditions precedent therefor are satisfied, and that before allowing amendment, the Court must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial and that it is the primary duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties and only if such a condition is fulfilled, the amendment is to be allowed. Thus, the proviso appended to Order VI Rule 17 of the Code was held to restrict the power of the Court and that it placed an embargo on exercise of its jurisdiction and that unless the jurisdictional fact as envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment.

12.2 In J.Samuel and others v. Gattu Mahesh and others² the Supreme Court while dealing with an application for amendment had held as follows:

"The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention; this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the Plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip. Though the Counsel for the Appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order VI Rule 17 with proviso or on the peculiar facts of that case."

"In the given facts, there is a clear lack of "due diligence" and the mistake committed certainly does not come within the preview of a typographical error. The term "typographical error" is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code."

12.3 In the above cited decision the Supreme Court having noted that omission running into 3 or 4 sentences cannot be a typographical error further

² (2012) Supreme Court Cases 300

held that the claim of typographical error/ mistake is baseless and cannot be accepted. The Supreme Court also held that in fact this omission could have been noticed and rectified then and there itself, had the person who prepared the plaint, signed and verified the plaint showed some attention and that in such circumstances, it cannot be construed that due diligence was adhered to. On facts, the ratio in the decision squarely applies to the case on hand on all fours. In the case on hand, the proposed amendment runs into several paragraphs and pages. Had the person, who signed the written statement and the counsel, were a little careful, they would have noticed the omission, if the contentions of the defendants are true. The contentions of the defendants that the above stated paragraphs 18 to 23 running into a few pages were also dictated by the counsel to his Steno-typist and that, while transcribing the dictated written statement, the Steno-typist had omitted to transcribe and typewrite the above stated paragraphs by mistake or oversight and that the counsel due to his heavy work did not verify the written statement before it was signed by him and the defendants and that the said omission was not noticed till the suit reached the stage of examination of DW1, cannot be countenanced in a Court of law, more particularly, in the light of the fact that the counsel for the defendants had already cross-examined not less than three witnesses examined on the side of the plaintiffs and further prepared the 1st witness for the defendants for his examination as a witness before the Court and also his affidavit in lieu of examination-in-chief. The defendants cannot be heard to say that even at the time of cross-examination of the witnesses for the plaintiffs or at a later point of time, the omission in the written statement could not be noticed. As rightly contended, neither the shorthand notebook of the Steno-typist nor his affidavit is filed before the trial Court to substantiate the contentions of the defendants. Therefore, it is obvious that the averments made in support of the request for amendment of the written statement are far from truth. It is no doubt true that an amendment, which is necessary for the

purpose of determining the real controversy between the parties and which is essential to shorten the litigation, can be permitted provided allowing of such amendment does not cause prejudice to the opposite party and the grounds urged in support of the request for amendment of the pleading are true and well founded. It is also true that if allowing of amendment is just and fair, such amendment can be allowed even at a belated stage of the proceedings. However, the above said legal principles cannot be applied to the case on hand as this Court has come to a conclusion based on facts and on the reasons already assigned supra that the proposed amendment cannot be permitted.

13. On the above analysis of the facts and the legal position squarely applicable to the case on hand, this Court holds that the petition for amendment filed by the petitioners/ defendants is devoid of merit and that the proposed amendment of the written statement cannot be permitted. As a sequel it must be held that the Tribunal is justified in passing the order impugned.

14. In the result, the Civil Revision Petition is dismissed confirming the order of the Tribunal.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision, shall stand closed.

M. SEETHARAMA MURTI, J

02nd December, 2016
RAR